ALPHABETICAL LIST OF AUTHORITIES.

1 Am. & Eng. Encyc. of Law, 975.
Bogert v. City of Elizabeth, 27 N. J. E., 568.
Canadian Pacific v. Moosehead Tel. Co., 76 Atl., 885.
Carlisle v. Carlisle, 2 Harr. 318 (Delaware).
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Code of Mississippi, Sections 550, 919, 920, 925, 1,856.
Cook v. Friley, 61 Miss., 1.
Cowley v. Northern Pacific R. R. Co., 159 U. S., 583.
Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686; (44 Southern Reporter, 166).
11 Cyclopedia of Law & Procedure, page 397.
15 Cyclopedia of Law & Procedure, page 812.
25 Cyclopedia of Law & Procedure, page 365.
29 Cyclopedia of Law & Procedure, page 1,433.
Day Land Co. v. State, 4 S. W., 865.
Devine v. Los Angeles, 202 U. S., 333.
Dick v. Foraker, 155 U. S., 404.
Drysdale v. B. & C. Co., 67 Miss., 534; 7 Southern Reporter,541.
Farrington v. Tourtelott, 39 Federal Reporter 739.
Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss., 773; 40 Southern Reporter, 485.
Greely v. Lowe, 155 U. S., 58.
Harrison v. Harwood, 31 Texas, 650.
Hurley v. Board of Miss. Levee Com., 76 Miss., 141; 23 Southern Reporter, 580.
Hyde v. Minn., D. & P. Ry. Co., 123 N. W., 849.
Jellinik v. Huron Copper Co., 177 U. S., 9.
Ladew v. Tenn. Copper Co., 218 U. S., 357.
Lewis on Eminent Domain, 403, 406.
Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258; 6 Southern Reporter, 181.
Mechem on Public Officers, 567.
Merchants Bank v. Evans, 51 Mo., 335.
Mining Co. v. Coyne, 147 S. W., 148.
More v. Steinbach, 127 U. S., 70.
Muller v. Boggs, 25 California, 175.
McMasters v. Carothers, 1 Penn. St., 324.
Oman v. Bedford—Bowling Green Stone Co., 134 Federal Reporter, 65.

Pennsylvania Railroad Company v. Heister, 8 Penn. St., 445, 452.
Peoples Bank of N. O. v. West, 67 Miss., 729; 7 Southern Reporter, 516.
Perkins v. Baer, 68 S. W., 939.
Polliham v. Reveley, 81 S. W., 182.
Pomeroy Equity Jurisprudence, Sec. 1,399.
Pullman Palace Car Co. v. Lawrence, 74 Miss., 782; 22 Southern Reporter, 53, 55.
Reynolds v. Crawfordsville Bank, 112 U. S., 405.
Scofield v. City of Lansing, 17 Michigan, 437.
Smithers v. Smith, 204 U. S., 642.
Spurlock v. Dornan, 81 S. W., 412.
State v. New Jersey, 25 N. J. Law, 309.
Sullivan v. Y. & M. V. R. R. Co., 85 Miss., 649; 38 Southern Reporter, 33.
Sumners v. Roberts, 13 N. C., 527.
Texas Co. v. Central Fuel Oil Co., 194 Federal Reporter, 9.
Verdin v. St. Louis, 33 S. W., 480.
Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Southern Reporter, 298.
Western Loan & Savings Co. v. Butte & Boston Consol. Mining Co., 210 U. S., 368.
White v. Memphis, B. & A. R. R. Co., 64 Miss., 566; 1 Southern Reporter, 730.
4 Words & Phrases, p. 3,519, 3,522.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No.....

LOUISVILLE & NASHVILLE RAILROAD COMPANY
Appellant.

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF FOR APPELLANT.

SUBJECT INDEX.

Statement of the case, Brief, pages 9 to 22.

Argument, Page 22.

1. The purpose of the bill of complaint is to enforce a claim to, and remove encumbrances and clouds from, property situate in the district where the suit is brought. Brief, page 22.

2. The judgments complained of operate to subject complainant's right of way to the use of defendant, and the only

way of testing their validity is by a bill in equity, such as that filed in this case. Brief, page 22.

Vinegar Bend Lumber Company v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84 (43 Southern Reporter, 292, 298.)

3. When the suit is between citizens of different states and is to establish a claim to, or to remove encumbrances or clouds from property, it is properly brought in the United States Judicial District where the property is situated. Brief, pages 23, 25.

Dick v. Foraker, 155 U. S., 404.
Jellinik v. Huron Copper Mining Co., 117 U. S., 9.

4. Every right to or interest in land, granted to the diminution of the value of the land, but consistent with the passage of the fee of it by a conveyance, is an encumbrance upon the land. Brief, pages 23, 24.

Farrington v. Tourtelott, 39 Federal Reporter, 739.
Oman v. Bedford-Bowling Green Stone Company, 134 Federal Reporter, 65.
4th Words and Phrases, page 3,519, 3,522.

5. Section 919s and 920 of the Code of Mississippi were set out in the bill of complaint to show that no order fixing the mode of service of process upon defendant was necessary. Brief, pages 26 to 28.

6. The general, but not universal, rule is that equity will not entertain a bill to cancel, as a cloud upon the title to real estate, an instrument void on its face. In some jurisdictions the rule does not apply to cases where it requires legal learning and acumen to determine whether the instrument is valid or void upon its face. Brief, pages 28, 29.

Merchants Bank v. Evans, 51 Mo., 335.
Polliham v. Reveley, 81 S. W., 182.
Mining Company vs. Coyne, 147 S. W., 148.
Perkins v. Baer, 68 S. W., 939.
Verdin v. St. Louis, 33 S. W., 480.

In other jurisdictions, the rule is repudiated entirely. Brief, page 29.

Scoefield v. City of Lansing, 17 Michigan, 437.
Day Land Company vs. State, 4 S. W., 865.
3rd Pomeroy's Equity Jurisprudence, Sec. 1,399.

7. In other jurisdictions, the rule is changed by statute, and this is true of the State of Mississippi. Brief, pages 29 to 34.

Section 550, Code of Mississippi.
Bogert v. City of Elizabeth, 27 N. J. Eq. 568.
Cook v. Friley, 61 Miss., 1.
Peoples Bank of N. O. vs. West, 76 Miss., 729, (7 Southern Reporter, 516.)
Hurley v. Board of Mississippi Levee Commission, 76 Miss., 141, (23 Southern Reporter, 580.)
Gambrill Lumber Co. v. Saratoga Lumber Co., 87 Miss., 773, (40 Southern Reporter, 485.)

8. Where the statute of the State authorizes the cancellation of an instrument void on its face, the Federal Courts will enforce the right so given. Brief, pages 33 to 38.

Reynolds v. Crawfordsville Bank, 112 U. S., 405.
Cowley vs. No. Pac. R. R., 159 U. S., 583.
Devine vs. Los Angeles, 202 U. S., 333.
Chapman v. Brewer, 114 U. S., 158.
More v. Steinbach, 127 U. S., 70.

Upon a motion to dismiss for want of jurisdiction, the court will only consider the relief sought and not whether the allegations of the bill entitled the complainant to such relief. Brief, pages 38 to 40.

Citizens Savings & Trust Co. v. Ill. Cent. R. R. Co., 205 U. S., 46.
Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. v. Central Fuel Oil Co., 194 Federal Reporter, 9.

9. Where one to whom the power of eminent domain has been delegated, threatens to make a permanent appropriation of property in excess of the power granted, or, without complying with the conditions upon which the power is granted, a court of equity will prevent the threatened wrong, without regard to the question of the irreparable damage. Brief, pages 40 to 43.

Hurley v. Board of Levee Commission, 76 Miss., 141, (23 Southern Reporter, 580.)
Canadian Pacific v. Moosehead Tel. Co., 76 Atl., 885.
Hyde v. Minn., D. & P. Ry. Co., 123 N. W., 849.
Spurlock v. Dornan, 81 S. W., 412.

10. For the purpose of Federal jurisdiction, the averments of the bill as to the value of the property in controversy, will be accepted, unless upon the face of the bill the averments be manifestly false, or unless they are tested by proper motion based upon a charge of fraud upon the jurisdiction of the court. Brief, page 43.

Smithers v. Smith, 204 U. S., 642.

11. Telegraph companies possess no powers of eminent domain, except for the use of new lines. Brief, page 43.

Code of Mississippi, Section 929.
Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Southern, 166.)

12. A new line is constructed within the meaning of Section 929 of the Code of Mississippi whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying lands not theretofore occupied by it. Brief, page 44.

Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Southern, 166.)

13. The bill alleges that the property sought to be condemned was already occupied by a telegraph line belonging to defendant, and that the condemnation proceedings were for the purpose of maintaining upon the property, an existing line. Brief, page 44.

14. If the application alleged that the condemnation was for a new line, but it was in fact sought for the maintenance of an existing line thereon, the defense could not be set up in the eminent domain proceedings, nor in an appeal therefrom, nor in any other way than by a bill in equity to have the judgments cancelled and the telegraph company enjoined from entering under said judgments. Brief, pages 45 to 47.

Vinegar Bend Lumber Co. v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84, (43 Southern, 298.)

15. In Mississippi a justice of the peace in an eminent domain proceeding acts ministerially, and the whole proceedings are special and statutory. Brief, page 47.

Sullivan v. Yazoo & M. V. R. R. Co., 85 Miss., 649, (38 Southern, 33.)

16. In such proceedings all of the material requirements of the statute must be strictly complied with, and such compliance must appear upon the face of the record. Brief, page 47.

White v. Memphis, B. & A. R. R. Co., 64 Miss., 566, (1 Southern, 730.)
Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258, (6 Southern, 181.)
15 CYC., page 812.
Lewis on Eminent Domain, 403, 406.

17. Section 1,856 of the Code of Mississippi requires the application for proceedings in eminent domain to be presented to the clerk of the circuit court, and requires him to appoint a competent justice of the peace, and fix a time and place for the

organization of the court, by an order endorsed upon the application, and no order was so endorsed. The orders were, in each case, made upon separate paper. Brief, pages 47, 48.

18. The act of the clerk of the circuit court in appointing a competent justice of the peace for the organization of the eminent domain court was judicial in its nature. Brief, pages 48, 49.

19. When the application is presented, the clerk must pass upon whether the application shows the right to condemn; if it does not, he has no power to make the order. Brief, page 49.

Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 684, (44 Southern, 166.)

20. A deputy clerk cannot perform a duty imposed upon his principal involving the exercise of judgment and discretion, unless specially authorized by law to do so. Brief, pages 49 to 51.

25 CYC. 365.
1 Am. & Eng. Encyc. Law, 975.
11 CYC., 397.
29 CYC., 1,423.
Mechem on Public Officers, 567.
Penn. R. R. Co. v. Heister, 8 Penn. St., 445, 452.
McMaster v. Carothers, 1 Penn. St., 324.
Sumners v. Roberts, 13 N. C., 527.
Carlisle v. Carlisle, 2 Harr 318 (Delaware.)
Sullivan v. Y.& M.V.R.R.Co., 85 Miss., 649, (38 Southern, 33.)

21. Powers conferred upon deputy clerks of courts are confined to acts to be done by the clerks *virtute officio*, and do not extend to acts required by special statute to be done by the clerk which are not connected with his office as clerk of the court. Brief, pages 51 to 52.

Muller v. Boggs, 25 Cal., 175.
Harrison v. Harwood, 31 Texas, 650.
State v. New Jersey, 25 N. J. Law, 309.

STATEMENT OF CASE AS MADE BY THE BILL OF COMPLAINT.

The bill of complaint seeks to cancel and annul three judgments of condemnation of part of Complainant's right-of-way in the Counties of Jackson, Harrison and Hancock in the State of Mississippi, and to remove the incumbrances and clouds thereby created upon complainant's title to such right-of-way.

The bill of complaint was filed April 27th, 1912, (Record, page 36), and alleges that the Complainant is a corporation created and organized under the Laws of Kentucky and has its principal place of business in the City of Louisville, State of Kentucky, while the Defendant is a corporation created and organized under the laws of New York and has its principal place of business in the City of New York.

The first paragraph of the bill of complaint reads as follows:

> "That this is a suit between citizens of different States of the United States; viz:—Between the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, and the Western Union Telegraph Company, a citizen of the State of New York, and the amount in dispute between Complainant and Defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); it is brought to enforce a claim to and to remove a cloud from the title to real property situate in the State of Mississippi, in the Southern Division of United States Southern Judicial District of said State. The real estate upon which the Complainant seeks to enforce a claim and from the title to which it seeks to remove a cloud, consists of a strip of land constituting Complainant's right-of-way, lying on each side of its main railroad track, and extending from the dividing line between the Counties of Jackson in the State of Mississippi and the County of Mobile in the State of Alabama, to the dividing line between the County of Hancock in the State of Mississippi, and the State of Louisiana, including the bridges in the Counties of Harrison and Hancock in the State of Mississippi. The property so taken is more particularly described in the

several judgment entries hereinafter set out, purporting to be judgment entries of courts of eminent domain." (Record, page 1.)

The bill also, by proper averments, shows that Complainant has title to its right-of-way by purchase, and actual occupancy for more than twenty years (Record, page 2); that the Defendant owned and maintained, and had for many years owned and maintained on Complainant's right-of-way, a telegraph line, but that its occupancy of such right-of-way, was under a contract which terminated on the 17th day of August, 1912 (Record, page 2); that the Defendant had filed three separate eminent domain proceedings to condemn the Complainant's right-of-way in Jackson, Harrison and Hancock Counties, Mississippi, to Defendant's use, for the purpose of continuing the use thereon of its existing telegraph line after the expiration of said contract (Record, page 3). Copies of the several applications by which eminent domain proceedings were commenced are made parts of the bill of complaint. (Record, pages 21 to 32).

The Statutes of Mississippi under which the eminent domain proceedings were instituted, are quoted in the bill of complaint and are as follows:—

Section 1,854, Chapter 43 of the Code of Mississippi of 1906.

> "Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter and not otherwise, except as specified in the Chapter on Landings, Mills and Mill-Dams and Roads, Ferries and Bridges."

Section 1,856 which is also part of Chapter 43 of the Code of Mississippi of 1906:—

> "When any person or corporation, having the right to do so, shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and the mortgagees, trustees or other persons having an interest therein or a lien

> thereon, shall be made defendants thereto and shall state with certainty the right and describe the property sought to be condemned showing that of each defendant separately. Application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent justice of the peace of the County in which the property or some part of it is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the County for the organization thereof." (Record, page 3).

The Bill of Complaint further alleges that the applications made in Jackson and Hancock Counties were presented to the Deputy Clerks of the Circuit Courts of those Counties, and that they made the orders under which the proceedings were had, in writing, upon separate papers, but did not endorse such orders upon the application. The Clerk of the Circuit Court of Jackson County subsequently made an endorsement upon the application, reciting that he had previously made the statutory order by a separate writing. The application made in Hancock County was presented to the Clerk of the Circuit Court, but he also made the statutory order upon a separate paper and subsequently endorsed upon the application that he had made such order. (Record, pages 3 and 4.)

The Bill alleges the organization of the eminent domain court in these several counties and the rendition of judgment of condemnation of part of Complainant's right-of-way to use of Defendant, and the tender by the Defendant in each instance of the damages ascertained by said proceedings, and Complainant's refusal to accept the same. (Record, page 16.)

The Bill further alleges that under the Statutes of Mississippi as construed by the Supreme Court of that State, a telegraph company is only authorized to condemn the right-of-way of a railroad company for the purpose of constructing new lines, and that new lines within the meaning of said Statute as so construed are lines on different routes from those of existing lines. (Record, page 12).

The Bill of Complaint alleges that under the Laws of Mississippi, the Eminent Domain Court had no power to hear or determine:—

(1.) Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use;

(2.) Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company was already devoted to a public use and whether, if so devoted, it was subject to condemnation by said Western Union Telegraph Company for the purposes set out in its several applications.

(3.) Whether the said Western Union Telegraph Company sought by said several applications to condemn the property of complainant for the use of a new line, or only for the maintenance of an existing line.

(4.) Whether the construction of the said telegraph line as proposed under said application for condemnation would be so placed as not to be dangerous to persons or property or interfere with the common use of complainant's right-of-way more than might be unavoidable.

(5.) As to what interest Complainant had in the property sought by the said Western Union Telegraph Company to be condemned. (Record, page 13).

The Bill of Complaint further alleges that the only question that could be heard and determined in those proceedings was the value of the land proposed to be taken; that, under the Laws of Mississippi, an appeal could have been taken from the judgment of the Eminent Domain Court to the Circuit Court, and upon appeal the issues are tried *de novo* in the Circuit Court, but that when the appeal is taken by the Defendant, it could not operate as a *supersedeas*, nor could the right of the Complainant to enter in and upon the land of the Defendant and to appropriate the same to public use, be delayed.

The Bill further alleges that said judgments of said Eminent Domain Court are void:—

(1.) Because they were not rendered by Courts of Eminent Domain constituted as provided by Law.

(2.) Because the property of Defendant sought to be condemned was already devoted to public use and was not subject to condemnation in said proceedings.

(3.) Because the purpose for which the said condemnation was sought was for the maintenance of an existing line and not for the construction of a new line.

(4.) Because the Defendant was not afforded an opportunity to be heard upon said several questions.

(5.) Because the Defendant was not afforded an opportunity to be heard as to whether or not the construction of said new line would be dangerous to persons or property.

(6.) Because the Complainant was not afforded an opportunity to be heard as to whether said line would be constructed and placed so as not to interfere with the convenience of complainant more than is unavoidable.

(7.) Because the Defendant was not afforded an opportunity to be heard as to what was Defendant's interest in the property sought to be condemned.

The Bill of Complaint further alleges that said Eminent Domain judgments authorized Defendant to enter upon and take possession of said right-of-way for the purposes for which the same were by said proceedings condemned, and that the Defendant intended to and would enter upon and take possession of said rights-of-way and operate their telegraph poles and wires thereon, unless enjoined. (Record, page 17.)

The Bill further alleges as follows:—

> "Complainant shows to your Honor that the Western Union Telegraph Company is and has been for many years, engaged in doing a corporate telegraph and cable business in the Southern Division of the Southern U. S. Judicial District, of the State of Mississippi, and it has, for many years, had and maintained offices and agents in said Division of said Judicial District."

By Section 919 of the Code of Mississippi, it is provided as follows:—

> "Any corporation claiming existence under the Laws of any other State or of any Country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that Corporations of this State are, by the Laws thereof, liable to be sued by any resident of this State. And also so far as relates to any transaction had in whole or in part within this State, or any cause of

> action arising here, and any corporation having any transaction with persons, or having any transaction concerning property situated in this State, through any agency whatever acting for it within this State, shall be held to be doing business here within the meaning of this Section."

By Section 920, it is provided that:—

> "Process may be served upon any agent of said corporation found within the County where the suit is brought, no matter what character of agent such person may be." (Record, page 17).

The Bill prayed that the several eminent domain judgments be decreed to be void and that entries thereunder be enjoined. (Record, pages 18, 19.)

DEMURRER.

The following demurrer to the bill was filled:—

"Comes the Defendant, The Western Union Telegraph Company for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court by protestation and confesses or acknowledges all or any part of the matters or things in said Bill of Complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to said Bill and for cause of Demurrer shows:—

(1.) "Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the Southern Division of the Southern District of Mississippi.

(2.) "Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court, does not confer jurisdiction and could not, the jurisdiction of this Court being determined by the Constitution and Laws of the United States.

(3.) "Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Court, and was not intended in any way to affect the jurisdiction of the Federal Courts or suits brought therein.

(4.) "For other reasons apparent." (Record, page 36.)

The District Court sustained the demurrer and dismissed the bill for want of jurisdiction. (Record, page 37.)

STATUTES OF MISSISSIPPI.

The statutory laws of Mississippi which affect the questions involved in this case are as follows:—Code of Mississippi, 1906.

Sec. 925 "All companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines shall be authorized to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, or waters, and along and across all turnpikes, railroads, and canals, and also through any of the public lands; but the same shall be so constructed and placed as not to be dangerous to persons or property, nor interfere with the common use of such roads, streets, or waters, or with the convenience of any land-owner more than may be unavoidable; and in case it shall be necessary to cross any highway, the same shall be so constructed as to cross such highway at right angles."

Sec. 1,876 gives to telegraph companies, organized under the laws of Mississippi, the right to condemn crossing over railroads.

Sec. 929. "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And inter-urban street railways, for the purpose of constructing new lines between cities, towns, or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns, or villages."

Referring to this Section, it is said by the Supreme Court of Mississippi in the case of Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Sou. Reporter, 168), that:—

> "It is our view that a new line is constructed within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route than that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them."

Code of Mississippi, 1906, Sec. 1,856, provides:—

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

Sec. 1,862 provides:—

"When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the circuit court shall be cause in the special court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned

as such, or had come to any place that he might be so summoned. The jurors drawn who are not empanneled shall not thereby be discharged if there be other issues to be tried, but shall remain in attendance on the court. While being empanneled each juror may be sworn truthfully to answer all questions that may be propounded to him. The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empanneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

Sec. 1,865 provides:—

"The justice shall instruct the jury, in writing, in the following words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record."

Sec. 1,866 provides:—

"The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of ..... dollars;' and it shall be signed by each of them. In case an informal or an unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged if there be other issues to be tried."

Sec. 1,867 provides:—

"Upon the return of the verdict, the court shall enter a judgment as follows, viz: 'In this case the claim of (naming

him or them), to have condemned certain lands named in the application, to-wit; (here describe the property), being the property of (here name the owner), was submitted to a jury composed of (here insert their names) on the.....day of....., A. D., ..., and the jury returned a verdict fixing said defendant's due compensation and damages at.....dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs, for which execution may issue.

"J. P."

Sec. 1,868 provides:—

"Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the clerk of the circuit court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it."

Sec. 1,871 provides:—

"Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a *supersedeas*, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to public use be delayed. Upon appeals, the issues shall be tried *de novo* in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments."

Sec. 550 provides:—

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

Sec. 919 provides:—

"Any corporation claiming existence under the laws of any other state or of any country foreign to the United States found doing business in this State, shall be subject to suit here to the same extent that corporations of this state are, by the laws thereof, liable to be sued by any resident of this state, and also so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here. And any corporation having any transaction with persons or having any transaction concerning property situated in this state, through any agency whatever, acting for it within this state, shall be held to be doing business here within the meaning of this section."

Sec. 920 provides:—

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon

any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing."

DEFENDANT'S CONTENTION.

The Defendant's contentions under its demurrer, are as follows:

(1.) That the Bill of Complaint could only be filed in the District whereof the complainant or defendant was an inhabitant.

(2.) That Section 919 of the Code of Mississippi, 1906, is relied upon to confer jurisdiction, and it did not confer jurisdiction upon any Federal Court.

(3.) For other reasons apparent.

(4.) The propositions urged in the lower courts under this ground of demurrer were:

(1.) That the judgments sought to be cancelled are void upon the faces of the several proceedings in which they were rendered, and do not therefore constitute clouds upon complainant's title to its right-of-way.

(2.) That each application for condemnation alleges in substance as follows:—

> "Your petitioner further stipulates and agrees that if at any time, in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of

its tracks or construct new tracks or side tracks where the same do not now exist, and for such purpose use or occupy that portion of said right-of-way on which petitioner's poles are or may be set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendant, remove said poles, cross-arms and wires to such other point or points on said defendant's right-of-way as shall be designated by said defendant."

That, under these allegations, the use of appellant's right-of-way cannot damage it, and that a muniment of title to the property of another that results in no damage, does not constitute an incumbrance or cloud upon the title thereto.

For convenience, the Appellant will be spoken of as Complainant, and Appellee will be spoken of as Defendant.

ASSIGNMENTS OF ERROR.

The following are the assignments of error:—

"Comes the Louisville & Nashville Railroad Company, the Plaintiff in Error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto as follows:—

1. The court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill for want of such jurisdiction."

ARGUMENT.

I.

THE BILL IS ONE TO ESTABLISH A CLAIM TO AND REMOVE AN INCUMBRANCE AND CLOUD FROM THE TITLE TO PROPERTY.

Complainant claims the exclusive right to the use of its entire right-of-way in Jackson, Harrison and Hancock Counties, Mississippi, while Defendant claims the right to take possession of, use and occupy parts of that same right-of-way. Defendant's claim is made under the three Eminent Domain judgments, copies of which are made parts of the bill of complaint, and Complainant seeks to have these judgments decreed to be void, and Defendant enjoined from taking possession of, using and occupying Complainant's right-of-way under them.

Each judgment describes the property condemned, recites the rendition of the verdict, and concludes as follows:—

> "Now, upon payment of said award, the applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application."

These judgments operate to subject Complainant's right-of-way, to the uses of the Defendant, and the only method of testing their validity, is by a bill in equity.

> Vinegar Bend Lbr. Co. v. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 298.

In this case it is held:—

1. That the Eminent Domain Court has no jurisdiction to try any question except the value of the property supposed to be taken.

2. That, upon an appeal from the judgment of the Eminent Domain Court, the Appellate Court can review no other question than that which was before the Eminent Domain Court—the value of the property taken.

3. That if the owner of a property desires to test the validity of a proceeding, or the right of the party seeking the condemnation to enter under such judgment, he must do so by a bill in equity.

If the Eminent Domain judgments constitute incumbrances or clouds upon the title of Complainant's right-of-way, then, under Section 57 of the U. S. Judicial Code of 1912, the bill of complaint was properly filed in the U. S. Judicial District in which the rights-of-way condemned are situated.

In the case of Dick vs. Foraker, 155 U. S., 404, it is said:—

> "The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought. The Defendant was a citizen of another state. The case was obviously within the jurisdiction of the court."

See also:—

> Greely v. Lowe, 155 U. S., 58.
> Jellinik vs. Huron Copper Mining Co., 177 U. S., 9.
> Citizens Svg. & Trust Co. vs. Ill. Cent. R. R. Co., 205 U. S., 46.

That the judgments do constitute incumbrances upon Complainant's property seems quite clear.

In Farrington vs. Tourtelott, 39 Fed. Rep., 739, the bill was filed by the vendor to enforce the specific performance of a contract for the sale of land that was conditioned upon the vendor's having a good title, free of all liens and incumbrances. The Defendant set up that there was a railroad upon the land and that its right-of-way constituted an incumbrance. To meet this contention, the bill was amended so as to set up that

the existence of the railroad upon the land was known to the defendant when the contract was made, and was one of the things that induced him to purchase it. The bill as amended was demurred to. The Court held that the right-of-way constituted an incumbrance upon the land and said:—

> "The best recognized definition, perhaps, of the term 'Encumbrance,' is that given by Parsons, C. J., in Prescott vs. Truman, 4 Mass., 66: 'Every right to, or interest in the land granted to the dimunition of the value of the land, but consistent with the passing of the fee of it by the conveyance.'"

In Oman vs. Bedford-Bowling Green Stone Co., 134 Fed. Rep., 65, the Stone Company owned both the land and the railroad track thereon, but Oman claimed to have the right to use the railroad to haul stone over it. A bill was filed by the Stone Company to quiet its title and enjoin the use of the railroad by Oman. The Court said:—

> "The rails, ties, etc., constituting the track, were held by the Railroad Company as personal property. When bought by the Stone Company, they did not, for that reason become so immovably attached to the soil as to put it beyond the power of the Stone Company to treat them as it might see fit. It had the right to continue to use them as tracks or remove them as personal property. In other words, they became the individual property of the Stone Company applicable to whatever use it might put them. But the Omans claimed the right to use them as railroad tracks in the transportation of their freight. This was an assertion of an interest not only in the track material but in the road-bed of the right to have the tracks kept where they were, and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the Stone Company."

A large number of authorities to the same effect will be found in 4th "Words & Phrases," pages 3,519, 3,522.

WHERE THERE IS DIVERSITY OF CITIZENSHIP A BILL TO ENFORCE A CLAIM OR REMOVE AN INCUMBRANCE OR CLOUD FROM REAL OR PERSONAL PROPERTY IS PROPERLY FILED IN THE DISTRICT WHERE THE PROPERTY IS FOUND.

The jurisdiction of the U. S. District Court, relied upon in the Bill of Complaint and shown by appropriate allegations, rests upon diversity of citizenship and the enforcement of claims to and the removal of incumbrances and clouds from property.

Except in certain cases, a suit between citizens of different states must be brought in the District where either the Plaintiff or the Defendant resides. If there was no exception to the general venue in suits where the jurisdiction depends upon diversity of citizens, this suit could not have been maintained in the United States District Court for the Southern Division of the Southern District of Mississippi.

The general rule as to venue is prescribed by Section 51 of the Judicial Code of the U. S. of 1912, but, by the express terms of that section, cases provided for by Section 57, of the U. S. Judicial Code of 1912, are excepted from the general rule. Section 51 of the Judicial Code provides, among other things, that:—

> "Except as provided for in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 57 of the Judicial Code is one of the six excepted Sections and provides that:—

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim, or to remove any incumbrance or lien or cloud upon the title to real or personal

> property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

The Bill of Complaint alleges that Complainant is a citizen of Kentucky and the Defendant a citizen of New York, and that the property to which a claim is sought to be established, and from which an incumbrance and cloud is sought to be removed, is situate in the District where the suit is brought. This brings it within the exceptions provided for by Section 57 of the U. S. Judicial Code.

SECTIONS 919 AND 920 OF THE CODE OF MISSISSIPPI, MERELY RENDERED IT UNNECESSARY TO OBTAIN A SPECIAL ORDER FOR SERVICE.

The second and third demurrer rest upon the idea that the bill of complaint relies upon Section 919 of the Code of Mississippi to confer jurisdiction upon the court. That Section reads as follows:—

> "Any corporation claiming existence under the laws of any other state or of any country foreign to the United States found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, by the laws thereof, liable to be sued by any resident of this state, and also so far as relates to any transaction had in whole or in part within this state, or any cause of action arising

here. And any corporation having any transaction with persons or having any transaction concerning property situated in this state, through any agency whatever, acting for it within this state, shall be held to be doing business here within the meaning of this section."

Section 920 of the Code of Mississippi reads as follows:—

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing."

It is, of course, conceded that neither these sections, nor any other law of the State of Mississippi, can confer jurisdiction upon the Federal Court. These particular statutes do not attempt to confer jurisdiction even upon the State Court. They merely subject a foreign corporation to suit in any Court held in Mississippi having jurisdiction, whether the suit be by a

resident or a non-resident of that state. They are only declaratory of the rule previously recognized in Mississippi that a foreign corporation doing business in a State other than that of its creation, is, in such other State, subject to suit both by a resident and a non-resident of such State.

Pullman Palace Car Co. v. Lawrence, 74 Miss., 782; 22 Sou. Rep., 53.

Under Section 919 of the Code of Mississippi a foreign corporation is merely located for the purpose of suit in Mississippi, and under Section 920, the method of service of process upon such corporation is prescribed.

These Sections are set out in the Bill of Complaint, not for the purpose of showing that the Court had jurisdiction of the cause or of the parties, but only to show that the Defendant could be found in Mississippi and process there served upon it, and that no order prescribing the method of service of process, was therefore necessary under Section 57 of the Judicial Code of the United States.

We will hereafter discuss the grounds upon which it is sought to have the several judgments cancelled and entries thereunder enjoined. The Defendant, however, contends that if the judgments are void upon the grounds presented by the Bill of Complaint, they are void upon their faces, and that a Court of Equity will not take jurisdiction to cancel an instrument that is void on its face. If this position was well taken, it would render a consideration of several of Complainant's contentions unecessary, and for that reason it will be first discussed, although the invalidity of the judgments upon one of the grounds urged in the bill of complaint does not appear upon the face of the proceedings.

UNDER THE MISSISSIPPI STATUTES A VOID INSTRUMENT WILL BE CANCELLED AS A CLOUD.

The general, but not the universal, rule is that equity will not entertain jurisdiction to cancel as a cloud upon title an instrument that is void upon its face. In some states the rule is qualified so as not to apply to cases where it requires legal

learning and acumen to determine whether the instrument is upon its face valid or void.

Merchant's Bank vs. Evans, 51 Mo., 335.
Polliham vs. Reveley, 81 Sou. West., 182.
Mining Co. vs. Coyne, 147 Sou. West., 148.
Perkins vs. Baer, 68 Sou. West., 939.
Verdin vs. St. Louis, 33 Sou. West., 480.

In other jurisdictions the rule is repudiated in its entirety.

Schofield vs. City of Lansing, 17 Mich., 437.
Day Land Co. vs. State, 4 Sou. West., 865.
3 Pomeroy's Equity Jurisprudence, Section 1,399.

Upon this last proposition, authorities might be multiplied, but the proposition itself is not deemed material to this discussion.

In other states the rule is changed by statute. This is the case in New Jersey and Mississippi.

In New Jersey, the statute reads as follows:—

> "When any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims or is claimed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title to said lands, and to clear up all doubts and disputes concerning the same.

Section 550 of the Code of Mississippi, of 1906, relates to the same subject matter, and reads as follows:—

> "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner such

> real owner may file a bill in the Chancery Court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

In the case of Bogert vs. City of Elizabeth, 27 New Jersey, Equity, page 568, the owner of a lot of land filed a bill to cancel a conveyance of his property made under a sale for the payment of a paving assessment, upon the ground that the proceedings under which the sale was made were illegal and void.

The Court first discussed the proceedings under which the sale was made, and concluded the discussion as follows:—

> "It is consequently clear that the sale of the complainant's land was an empty form, and passed no title to the city."

The Court then discussed the conflict between the Courts as to whether a Court of Equity will cancel an instrument which is void upon its face, for the purpose of removing a cloud upon the title to property, and then says:—

> "In the case now before this Court the illegality of this sale and of all the proceedings leading to it is, at first view, so conspicuous, that if, in this state, the question of the jurisdiction of the Court had to be decided from consideration derived from general principles, it is easy to see that a conclusion could not be reached without difficulty. But this is not the case, for the inquiry is controlled by the act to quiet titles, passed March 2, 1870."

The Court then quotes the act which is set out above and proceeds as follows:—

> "The object of this enactment, I think, is obvious: it was to extend the jurisdiction of the Court of Equity

over the class of cases embracing the present one. Unless this was the design, I am at a loss to assign to it any office, for the jurisdiction of the Court, to the extent of the English and New York rule, could not have been deemed in doubt. The act is plainly remedial, and its language is very comprehensive, and in my judgment it should be construed to give jurisdiction in every case in which any claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that land should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of the property when on sale. The policy which the statute is designed to promote is beneficial and enlightened, and it should be received with favor. It provides adequate checks against abuse, for it declares that if the defendant shall suffer a decree *pro confesso* to be taken, such decree shall not carry costs; and if he shall deny that he claims any interest or encumbrance in the premises, he shall be entitled to costs. I can not see why under these safeguards against vexation, an owner of land should not have the privilege, in every imaginable case, of putting to the test, everything which presents a suspicious appearance against his title. The sale in the present case was impressive by being made under a city ordinance, conducted by official authority, and in the course of a procedure presenting to the unprofessional eye, the ordinary marks of legality. Its effect, I cannot doubt, would be to detract, in a considerable degree, from the market value of the land. In my opinion, the statute in question can have no more appropriate use than in its application to this situation."

In the case of Cook v. Friley, 61 Miss., page 1, a bill to remove a cloud was filed, and the Court said:—

"If the complainant is the real owner of the land and the defendant either has any evidence of title thereto, or asserts any claim or pretends to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may

exhibit his bill against such person to have such evidence of title canceled or the cloud, doubt or suspicion removed from the title.

"The statute 1833, of the Code of 1880, not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the Court. The defendant in such case must maintain his claim or right, or it will be disposed of by decree against him. If he disclaims all right or title, it is a mere question of costs. If he asserts a claim or right as to the land, its validity will be passed on by the Court. All that the complainant need aver is that he is the real owner, and that the defendant is not, but asserts claim or pretends to some right to his land so as to cast doubt or suspicion on his title, which he seeks to have disposed of as a cloud on his title—clearing it by decree of the Court."

In the case of the Peoples Bank of New Orleans vs. West, 67 Miss., 729; 7 Sou. Rep., 516, an attachment was levied and the property sold thereunder, and the deed made to the purchaser was attacked by a bill in equity upon the ground that the attachment proceedings were void, and the deed made thereunder, a cloud upon the owner's title.

The Court discussed the validity of the attachment proceedings and reaches the conclusion that they were void and then concludes as follows:—

> "When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant and should be cancelled."

In the case of Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; 7 Sou. Rep., 541, the property had, as in the last case, been levied on under attachments and sold, and the bill was filed to cancel the deed thereto as a cloud upon the title to the property.

The Court discusses the irregularity of the attachment proceedings, and holds that they were void and the deed a cloud upon the title, as follows:—

> "The flagrant disregard of these plain statutory requirements, designed to give a non-resident defendant notice of the pendency of an attachment suit against him, must be held to vitiate and nullify all subsequent proceedings in the causes. Without any former adjudications on this point (and there are several in our reports) it seems incredible, almost, that any sane suitor should begin proceedings under our attachment laws, and hope to win in a legal contest, in despite of his gross neglect of the simplest and plainest provisions of the statutes on the subject of attachments. From the record, as it appears here, the appellant was entitled to have the relief prayed in his bill."

See also:—

Hurley vs. Board of Miss. Levee Commission, 76 Miss., 141; 23 Sou., 580.

Gambrill Lumber Co. vs. Saratoga Lumber Co., 87 Miss., 773; 40 Sou., 485.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou., 299.

It follows that under the influence of the Mississippi statute an instrument void upon its face, or a mere claim that could not be enforced in any court may be annulled and cancelled as a cloud upon the owner's title; and when under the statute

of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to a Federal Court of Equity for the same purpose if the other jurisdictional elements are present.

In the case of Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill was filed to cancel a certain deed as a cloud upon the complainant's title and it was found by the Court, among other things, that the deed was "wholly inoperative, null and void," and a cancellation of it as a cloud upon complainant's title was decreed. An appeal was taken from this decree and the Supreme Court of the United States, on page 409, *et seq.*, said:—

> "The appellant next complains of the decree rendered by the Circuit Court, and his first objection is, that the Court had no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the Legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. Broderick's Will, 21 Wall, 503, 520. And, although a State law cannot give jurisdiction to any Federal Court, yet it may give a substantial right of such a character, that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty, or common law. *Ex parte* McNeil, 13 Wall., 236, 243.
>
> While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the Court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the Courts of the

United States sitting in equity have jurisdiction to remove this was expressly held in the case of Clark vs. Smith, 13 Pet., 195, 203, where it was said by this Court: 'Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what shall form a cloud on titles; and having so declared, the Courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature.'

"The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. 1070 Rev. Stat. of Indiana, 1881, provides as follows: 'An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.'

"This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the Courts.

"Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. Marot vs. The Germania Building Association, 54 Ind., 37; Jeffersonville &c. Co., vs. Oyler, 60 Ind., 383.

"The bill of complaint in this case complies with this rule by averring that 'said Reynolds is, under his deed' (from Baird, the assignee), 'claiming and asserting title paramount to the title of this complainant;' and the answer to the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

"The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained

of, has been, in effect, decided in the affirmative by this Court in the case of Holland vs. Challen, 110 U. S., 15.

"In that case, a statute of Nebraska was under review, which provided that 'an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title.' The Court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

"If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face.

"As the same statute authorizes the Court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In the case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, the Court says:—

"Although the statute of a State or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts may enforce on their equity

or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus in *ex parte* McNeil, 13 Wall., 236, a statute of the State of New York giving to the pilot, who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the District Court. See also the cases of Broderick's Will, 21 Wall., 503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So in Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the Circuit Court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in Davis vs. Gray, 16 Wall., 203, 231, that ' a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunal.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15; Marshall vs. Holmes, 141 U. S., 589; Johnson vs. Waters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86."

To the same effect, see:—

Devine v. Los Angeles, 202 U. S., 333.
Chapman vs. Brewer, 114 U. S., 158.
More vs. Steinbach, 127 U. S., 70.

It is submitted, therefore, that even if the District Court could, under a demurrer to the jurisdiction, have considered the question as to whether or not the bill contained equity, still the decree dismissing the bill for want of jurisdiction would have been erroneous as the bill contained equity to remove the cloud from Complainant's right of way in each of the counties.

THE COURT COULD NOT DECLINE TO TAKE JURISDICTION BECAUSE THERE WAS NO EQUITY IN THE BILL OF COMPLAINT TO REMOVE CLOUDS.

The fourth ground of demurrer is "For other reasons apparent." Under this ground of demurrer it was urged that the bill of complaint shows that the several judgments complained of are void upon the faces of the proceedings in which they were rendered, and do not, therefore, constitute clouds upon complainant's title to its rights of way; that void judgments do not constitute clouds upon title to property.

Also that the judgments and the taking thereunder would not injure complainant.

In the case of Ladew vs. Tennessee Copper Co., 218 U. S., 357, 361, a bill was filed seeking to enjoin the defendants from operating furnaces, smelters and ovens in proximity to complainant's timber lands, upon the ground that the fumes from defendant's plant would destroy the timber upon complainant's property, and the contention was that the right to have defendant so use its property as not to injure complainant's property constituted a claim to that property within the meaning of the 57th section of the Judicial Code of the United States.

The Court, speaking through Mr. Justice Harlan, refused to sustain the contention and held the suit to be a mere personal action to abate a nuisance. In that case Complainant made no claim of any kind to Defendant's property, nor did Defendant make any claim to Complainant's property. No instrument existed which purported to create any claim or right to the property of either party, and no claim was made thereto.

In the case of the Citizens Savings & Trust Co. vs. Illinois Central Railroad Co., 205 U. S., 46, the bill was filed by an Ohio corporation as a stockholder in "The Bienville Company," et al., to set aside certain leases and conveyances of the "Bienville Company," and for an accounting, and it was held that if the property purporting to have been conveyed or leased was in the district where the suit was brought, then the suit was properly brought and the Court had jurisdiction. The Court declined to consider whether the allegations of the bill entitled the Complainant to relief or not. Upon this subject the Court, on page 58, said:—

> "We express no opinion upon the question whether, upon its showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, as one to remove incumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to such district."

In the case at bar, it is clearly shown that Complainant owns the rights of way, subject to such interest therein, if any, as were created by the judgments complained of; that the Defendant claims a right to the possession and use of parts of Complainant's rights of way under and by virtue of such judgments. The bill seeks to cancel these judgments as incumbrances and clouds upon Complainant's title and to enforce and protect its claim to the exclusive use of its entire rights of way.

Defendant's contention is that under the allegations of the bill, the judgments under which Defendant claims a right to the possession and use of parts of Complainant's rights of way, are void upon the faces of the proceedings under which they were rendered and that the judgments do not, therefore, constitute clouds upon Complainant's title. We have discussed this question fully, but even if it justified the dismissal of the bill for want of equity, it would not deprive the District Court of jurisdiction.

When the bill was filed and the jurisdiction of the Court questioned, upon the ground that the bill was not a bill to enforce a claim or remove a cloud from property, the Court was confined to this inquiry—What is the purpose of the bill? It could not inquire whether the allegations of the bill entitled Complainant to the relief sought.

If, upon an examination of the bill, the Court found that it was not the purpose of the bill to enforce a claim or remove an incumbrance or cloud, the Court should have declined to take jurisdiction as the Court did in the case of Ladew vs. Tennessee Copper Company. If, on the contrary, such appeared to be *the purpose* for which the bill was filed, the Court was obliged

to take jurisdiction of the cause before it could determine whether the allegations of the bill were sufficient to entitle the Complainant to relief, and had the demurrer attacked the bill upon the ground that it contained no equity to cancel the judgments complained of, as clouds upon Complainant's title, because the allegations of the bill showed that such judgments were void upon their faces, the Defendant would have thereby waived the want of jurisdiction in the Court based upou venue.

Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. vs. Central Fuel Oil Co., 194 Fed. Rep.,1, 9.

If, then, the demurrer presented the question of want of equity in the bill, to cancel the judgments as clouds upon the title, the question of venue was waived; if, on the other hand, the demurrer did not raise that question, then that question was not before the Court.

DEFENDANT CLAIMS THAT THERE WAS NO JURISDICTION TO CANCEL AN INCUMBRANCE OR CLOUD BECAUSE NO DAMAGE IS SHOWN.

Each application by which the proceedings complained of were commenced, contained substantially the following language:—

> "And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its track, or construct new tracks or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed and wires strung, that petitioner will, at its own expense, upon reasonable notice from said defendant, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendant."

The defendant contends that under this stipulation there can be no damage to the railroad by the use of its right of way for telegraph purposes, and in support of this proposition, they rely upon the case of the Mobile & Ohio Railroad Co. vs. the Postal Telegraph Company, 76 Miss., 731, 26 Sou., 370.

It is true that in that case Mr. Justice Whitfield expressed the opinion that a railroad could only sustain nominal damages by the use of its right of way by a telegraph company, but whether a railroad does or does not sustain damages by the taking of its property is a question of fact, depending upon the circumstances of each case and one that is, by statute, submitted to the determination of an eminent domain court. If the right to condemn existed and the eminent domain courts in which the judgments complained of were rendered were lawfully organized, then the verdicts rendered by those courts as to the amounts of damages that Complainant will sustain by the use of its property for the purpose declared in its original application is *res adjudicata* between the parties.

> Vinegar Bend Lumber Co. vs. Georgetown & Oak Grove R. R. Co., 89 Miss., 84; 43 Sou., 295.

If, on the other hand, defendant had no right to condemn or if the tribunals were not lawfully organized, then, the question has not been adjudicated, and under the laws of Mississippi, no tribunal other than a court of eminent domain can determine it.

> M. J. & K. C. R. R. Co. vs. Hoye, 87 Miss., 571; 40 Sou., 5.

Even if the question of damages was one within the jurisdiction of a chancery court, it could not be said that the railroad company would sustain no damage by the use of its right of way on account of the stipulation contained in the application.

A railroad company has the right to operate a telegraph line as appurtenant to its railroad.

> Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 76 Miss., 731; 26 Sou., 370.

The third paragraph of the bill of complaint shows that the Western Union Telegraph Company has heretofore occupied the right of way of the railroad company under a contract,

and that the contract has ceased to exist. The court judicially knows that a railroad company cannot be successfully operated without the use of a telegraph line, and as the bill shows that the contract between the telegraph company and the railroad company has been terminated, it necessarily follows that the railroad company must have for the operation of its trains, a telegraph line.

Now, the stipulation contained in the application is that the telegraph company will remove its poles and wires when it becomes necessary for the railroad company to change the location of its tracks or to construct new tracks, or side tracks where the same do not now exist, but there is no stipulation that they will remove them if the right of way becomes necessary for the use of a telegraph line by the railroad company. Besides this, the judgment of condemnation in each case, authorizes the telegraph company to attach its poles, cross-arms and wires to such portion of the bridges of the railroad company as is within the county as to which the condemnation applies. There can be no presumption that this will create no damage.

Besides, under Section 550 of the Code of Mississippi hereinabove set out, the right to cancel the instrument or claim is given, without regard to the damage resulting therefrom.

In Hurley against Board of Mississippi Levee Commission, 76 Miss., 141, 23 Sou., 580, the Court, qouting from "Beach Modern Equity Jurisprudence," said:—

> "Where the power of Eminent Domain has been delegated to public officers or others, who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted, or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a monied compensation."

See also:—

Canadian Pacific v. Moosehead Telg. Co., 76 Atl. Rep., 885.
Hyde v. Minn. D. & P. Ry. Co., 123 N. W., 849.
Spurlock v. Dornan, 81 S. W., 412.

FOR THE PURPOSE OF FEDERAL JURISDICTION THE ALLEGATIONS OF THE BILL AS TO THE VALUE OF THE PROPERTY INVOLVED MUST BE ACCEPTED.

Smithers v. Smith, 204 U. S., 642.

While it is not believed to be material to the errors assigned we submit that the bill contains equity upon several different grounds.

THE EMINENT DOMAIN PROCEEDINGS WERE FOR THE MAINTENANCE OF AN EXISTING TELEGRAPH LINE, AND THERE IS NO POWER OF EMINENT DOMAIN FOR THAT PURPOSE.

The only rights of eminent domain conferred upon telegraph companies to condemn to their use, rights of way of railroads in the State of Mississippi, are those granted by Section 929 of the Code of Mississippi.

In the case of the Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166), the Court said:—

> "In the whole chapter on corporations, the grant of eminent domain powers is found in but one section, and this is in Section 929 above referred to, and is conferred upon telegraph and telephone companies, whether foreign or domestic, and for the purpose of constructing new lines; and the only other corporation which is given this power in the chapter on corporations is an interurban street railway, and as with telephone companies, it is given only for the purpose of constructing now lines."

Each of defendant's applications for eminent domain proceedings described the particular property sought to be condemned. (Record, page 21.) The property so described are parts of complainant's right of way, one hundred feet in width, lying in the State of Mississippi, between the Alabama and the Louisiana line. Each application alleges that the

defendant desired to erect and maintain thereon its telegraph poles, cross-arms and wires "the said line of poles, cross-arms and wires to be constructed and for which this condemnation is sought being a new line."

A new line, within the meaning of Section 929 of the Code of Mississippi, is defined by the Supreme Court of that State in the case of Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166), as follows:—

> "A new line is constructed within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them."

It follows that, if the property described in the application and sought to be condemned for the use of the defendant, was, at the time the proceedings were begun, already occupied by a telegraph line belonging to the defendant, then the defendant had no power to condemn the property.

The bill of complaint alleges that the property was so occupied. These allegations are made in the fourth, fifth (Record, pages 2 and 3), and eleventh (Record, page 12) paragraphs of the bill of complaint, and are as follows:—

> "The defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated, a line of telegraph poles, and wires along and upon the said right of way, from the dividing line between the State of Alabama and the State of Mississippi to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is and has for many years, been located, maintained and operated upon complainant's right of way, and upon or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto to the other of said parties, of a desire

or intention to terminate the same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof by the defendant, as provided by the terms of said contract." (Paragraph four, Record, page 2.)

"Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the defendant, the Western Union Telegraph Company, attempted to obtain by the proceedings herein alleged and complained of, the right to continue the use of complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end, the said defendant, the Western Union Telegraph Company presented three separate applications for the condemnation and use of the defendant, the Western Union Telegraph Company, of part of complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged." (Paragraph five, Record, page 3.)

"Complainant further shows to your Honor that, although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth, said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the defendant, the Western Union Telegraph Company in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the defendant for said purpose." (Paragraph eleven, Record, page 12.)

It follows that if the allegations of the bill of complaint be taken as true for the purpose of the demurrer, then defendant had no right of eminent domain for the purposes for which its

proceedings were instituted, and said several judgments are void.

The defendant contends that when the proceedings of an eminent domain court are attacked as void, the court must look to the allegations of the application, and that these allegations are conclusive. In other words, the contention is that the application states that the proposed lines are new lines (which the Supreme Court of Mississippi says means that defendant has not already a telegraph line located upon the same property) and that complainant will not be allowed to show by the bill that the property was in fact already occupied by an existing line belonging to the defendant.

Under the laws of Mississippi, Defendant had no right to condemn the property if it already had an existing telegraph line upon it.

> Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166.)

But it could not set up this want of power, either in the eminent domain proceedings, or upon an appeal therefrom, or in any other way than in a court of equity.

> Vinegar Bend Lumber Co. v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84 (43 Southern Reporter, 296.)

If defendant's position is maintainable, property can, by a mere false allegation in the application for eminent domain proceedings, be taken by one not having a right thereto, without the owner having an opportunity to be heard in any tribunal. In short, without due process of law.

In the case last cited, the applications for eminent domain proceedings were alleged to be for a public use, and the court expressly held that the proceedings were void if the use for which the property was condemned was not one in aid of which rights of eminent domain were conferred, and that the proper and only method of challenging this right was by a bill in equity to have the judgment declared void, and to enjoin an entry thereunder.

The judgments in this case are also attacked because the orders appointing justices of the peace for the purpose of organizing the eminent domain court were not made by endorsements upon the applications, but by orders made upon separate papers.

IS THE REQUIREMENT OF THE STATUTE THAT THE ORDER BE ENDORSED UPON THE APPLICATION MANDATORY?

Under the laws of Mississippi, the justice of the peace in an eminent domain proceeding acts ministerially, and the whole proceedings are special and statutory.

> Sullivan v. Yazoo & M. V. R. R. Co., 85 Miss., 649 (38 Southern Reporter, 33.)

In such proceedings, all of the material requirements of the statute *must be literally complied with*, and such compliance must *appear upon the face of the record.*

> White vs. Memphis B. & A. R. R. Co., 64 Miss., 566. (1 Southern Reporter, 730.)
> Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258 (6 Southern, 181.)
> 15 Cyclopedia of Law & Procedure, 812.
> Lewis on Eminent Domain, Sections 403, 406.

In the case of White vs. Memphis, B. & A. R. R. Co., 1 Southern, 730, the proceedings were under a charter, but were similar to the proceedings described by Chapter 43 of the Code of Mississippi, and speaking of such proceedings the Court says:—

> "The remedy is summary, in derogation of the common law, and is wholly governed by the statute. In such cases the material requisites of the statute must be complied with, and compliance must appear on the face of the record."

Section 1,856 of the Code of Mississippi requires the petition or application for condemnation to be presented *to the clerk of the court*, and requires *him to endorse thereon* the appointment

of *a competent justice of the peace* to constitute, with a jury, a special court of eminent domain, and to fix a time and place in the county for the organization thereof.

The bill of complaint shows that in neither instance was there any appointment of a justice of the peace *by endorsement upon the application*, and as the statute does not authorize any other method of appointment, nor the evidencing thereof in any other way, a proceeding which does not show upon its face such an appointment *by such an endorsement upon the application* fails to show *on the face of the record*, compliance with the material requisites of the statute.

The contention of the defendant is that the statute should be liberally construed, and that the endorsement of the order upon the application is not mandatory; that the making of an order upon a separate piece of paper is a substantial compliance with the statute.

The contention that the statute must be liberally construed is in conflict with the authorities cited above, and an examination of the eminent domain proceedings will show that in the State of Mississippi, nothing is left to the discretion of the officers instituting or conducting the proceeding. Every step of the proceeding is laid down in exact form. The exact form of the verdict of the jury, and the exact form of the judgment entry are both prescribed.

In two of the instances complained of proceedings were commenced by the presentation of applications *to deputy clerks* of the circuit court, and the eminent domain courts were organized by justices of the peace *appointed by such deputies*. Complainant contends that *deputy clerks were without authority to make the order under which the eminent domain courts were organized*, and that the proceedings were, therefore, void.

DEPUTY CLERKS OF THE CIRCUIT COURT ARE WITHOUT AUTHORITY TO MAKE ORDERS IN EMINENT DOMAIN PROCEEDINGS.

Section 1,856 of the Code of Mississippi requires the petition or application for condemnation to be presented *to the clerk of the court*, and requires him to endorse thereon the appointment of *a competent justice of the peace* to constitute, with a jury, a special court of eminent domain, and to fix a time and place in the county for the organization thereof.

The act of the clerk, in appointing a justice of the peace, as a constituent part of an eminent domain court, is necessarily judicial in its nature. He is required to make the appointment of *a competent justice*, and must necessarily determine whether the justice *is or is not competent*. He is required to make the appointment if the allegations of the application show that the applicant has the right to condemn, and he should not do so if the application fails to show that the applicant had the right to condemn. This results from the fact that unless the application shows the right to condemn, the clerk has no power to appoint a justice of the peace, or to make any other order; and any proceedings under such an application is a nullity.

> Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 684 (44 Southern Reporter 166.)

A deputy cannot perform a duty imposed upon his principal which involves the exercise of discretion and judgment, unless expressly authorized to do so by some law.

> 23 Am. & Eng. Encyc. Law, 365 and 266.
> 1st Am. & Eng. Encyc. Law, 975.
> 11 CYC., 397.
> 29 CYC., 1,433.
> Mechem on Public Officers, 567.

In the case of the Pennsylvania Railroad Company vs. Heister, 8 Penn. St., 445, 452, a statute provided that in inquisition proceedings to determine the value of land taken by a railroad, the court of sessions should, on application of the owners "issue a precept to the sheriff, commanding him to summons twenty disinterested free-holders" to ascertain what damages had been sustained, and that twelve of the jurors should be impannelled and sworn by the sheriff or his deputy to estimate the value of the land. The sheriff, instead of summonsing the jury from the county at large, summonsed them from a list prepared by his deputy. The Court said:—

> "In the two cases of McClure v. Doctor Riley, exception is taken to the manner of selecting and summonsing the jurors.. Although I am perfectly

satisfied of the integrity of the transaction, yet I am convinced that the sheriff has proceeded in a mistaken view of his public duties. The sheriff is commanded to summons twenty discreet and disinterested free-holders from the body of the county, and not from a list prepared by another, although that other may be the deputy sheriff."

In McMaster v. Carothers, 1st Penn. State, 224, it is said:—

> "It is error for the constable, without other warrant than a verbal direction from the deputy sheriff, to select and summons the inquest. The selection of a jury implies judgment and discretion, and partakes so much of a judicial character that it cannot be delegated by a person who is himself but a deputy. The officer who selects a jury performs an important duty to the parties, essential to the administration of justice under the solemn sanction of his oath of office. It is obligatory to be performed by himself, and not by another, and a subsequent ratification of the act improperly committed to another, instead of validating it, would itself be questionable."

In Sumner v. Roberts, 13 N. C., 527, it was held that a deputy clerk could not certify the probate of a will, the act being considered judicial in its nature.

In Carlisle v. Carlisle, 2 Harrington, 318 (Delaware) the Court said:—

> "Wherever the legislature has, by statute, conferred upon a ministerial officer, such as the prothonotary, a power requiring the exercise of judgment and sound discretion for the protection of interests which are manifestly from the face of the statute the subject of legislative solicitude, he cannot delegate the trust to another, but must faithfully discharge it himself. If he delegates the power to another to be exercised in his absence, the interest intended to be protected by the act cannot be affected by the exercise of such power."

Section 1,006 of the Code of Mississippi (which is part of Chapter 27) provides for the appointment of a deputy clerk as follows:—

> "The clerk of the Supreme Court, of the Crcuit Court and of the Chancery Court shall have power, with the approbation of the court or of the judges in vacation, to appoint one or more deputies who shall take the oath of office, and who thereupon shall have power to do and perform all the acts and duties which their principals may lawfully do."

The acts which the deputies are authorized by this section to do are acts relating to the performance of the duties of the clerks of the courts *virtuti officio*, and does not include other acts to be done under special authority conferred upon clerks by statute.

Section 1,000 (which is also part of Chapter 27 of the Code) provides as follows:—

> "Each court shall have control over all proceedings in the clerk's office of such court during the preceding vacation, and may correct any errors or mistakes therein, and may set aside any of said proceedings, and may make such orders therein as may be just and proper; and may, for good cause shown, reinstate any case discontinued during said vacation; and shall also have power to arrange the business therein in a convenient manner and to establish, from time to time, rules and orders for the conducting of suits, proceedings and respecting all matters to be done in term time or in vacation, not repugnant to law."

As has been shown by Section 1,856 (which is part of the Eminent Domain Chapter) the clerk is required to fix the time for organizing the court of eminent domain, and if the provisions of Chapter 27 of the Code were applicable to the duties of the clerk performed under the Eminent Domain Chapter, the Judge of the Circuit Court could, under Section 1,000, change the time fixed by the clerk organizing the eminent domain court; or

should the clerk fail to fix such time the Judge of the Court would have the authority to do so, and yet the Supreme Court of Mississippi has clearly held that the Court has no such power.

In Sullivan vs. Y. & M. V. R. R. Co., 85 Miss., 649 (38 Southern, 33), the Supreme Court of Mississippi, reviewing an order of mandamus issued by the Judge of the Circuit Court, wherein it had directed the eminent domain court to proceed upon a day fixed by the judge, said:—

> "The clerk of the circuit court is directed by law to fix the time at which and the place where, the court of eminent domain is to meet, and to summons eighteen men from whom the jury is to be selected. We do not think that the Circuit Judge has power to fix the time or place in his orders, for the reconvening of the eminent domain court, or to direct the justice of the peace to have other competent parties summoned as jurors."

Section 1,006 of the Code of Mississippi only applies to acts of the clerk *virtuti officio*, and not to special authority conferred upon him by statute.

Muller v. Boggs, 25 Cal., 175.
Harrison v. Harwood, 31 Texas, 650.
State v. New Jersey, 25 N. J. Law, 309.

Respectfully submitted,

GREGORY L. SMITH,
HENRY L. STONE,

for Appellant.

STATE OF ALABAMA, County of Mobile.

Personally appeared before me, W. G. Caffey, a Notary Public in and for said State and County, Gregory L. Smith, who being sworn, deposes and says that on the 9th day of February, 1914, he deposited in the United States Postoffice at Mobile, Alabama, postpaid, copies of the brief, to which this affidavit is attached, addressed as follows, viz:

One copy addressed to Mr. Rushton Taggart, at No. 195 Broadway, New York City, New York.

One copy addressed to Mr. Geo. H. Fearons, at No. 195 Broadway, New York City, New York.

One copy to Mr. J. B. Harris, Jackson, Mississippi.

Mr. Rushton Taggart and Mr. Geo. H. Fearons are the attorneys of record for Appellee in said cause.

That the postoffice address of Mr. Rushton Taggart and also Mr. Geo. H. Fearons, is No. 195 Broadway, New York City, New York.

Affiant further deposes and says that the said several briefs, so mailed, should, by due process of mail, have reached each of the said several parties to whom they are addressed, before the time of the filing of this brief.

.....

Subscribed and sworn to before me this 9th day of February, 1914.

.....

Notary Public, Mobile County, Alabama.

We acknowledge service of a copy of said brief this the .....day of February, 1914.

.....

Attorneys for Appellee.